APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEIF TAYLOR,	)	No. CV 97-7033-RJK (MAN)
	)	
Petitioner,	)	**REPORT AND**
	)	**RECOMMENDATION OF**
v.	)	**UNITED STATES**
	)	**MAGISTRATE JUDGE**
THOMAS MADDOX,	)	
Interim Director,	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a California state prisoner proceeding *pro se*, filed a "Petition For Writ Of Habeas Corpus By A Person In State Custody," pursuant to 28 U.S.C. § 2254, on September 23, 1997 ("Petition"). On January 30, 1998, Respondent filed a Return to the Petition. On November 5, 1998, Petitioner filed a "Request for Stay of Petition," seeking a stay of this action while he exhausted certain allegedly newly-discovered claims not included in the Petition. On November 9, 1998, the Court granted Petitioner's Request, and ordered that this action be

stayed while Petitioner pursued exhaustion, and directed Petitioner to file a motion for leave to amend and a proposed First Amended Petition once exhaustion was completed.

Subsequently, the Court requested, and received from Petitioner, periodic status reports regarding his exhaustion efforts. On March 6, 2000, Petitioner submitted his proposed First Amended Petition and a motion for leave to amend. Following briefing, on May 16, 2000, the Court issued an order denying the motion for leave to amend because certain issues raised within Ground Two of the proposed First Amended Petition were unexhausted (i.e., a claim of instructional error). On June 2, 2000, the Court granted Petitioner's request to strike the unexhausted instructional error claim from Ground Two and ordered that the proposed First Amended Petition be filed ("Amended Petition"). On August 31, 2000, Respondent filed a Return to the Amended Petition ("Return"). On November 2, 2000, Petitioner filed his Traverse.

The matter is now submitted and ready for decision. Having reviewed the allegations of the Amended Petition and the matters set forth in the Return, the Traverse, and the record, it is recommended that the Amended Petition be denied and dismissed with prejudice.

PRIOR PROCEEDINGS

Following a state court jury trial, Petitioner was convicted of first degree murder and second degree robbery. (Clerk's Transcript ("CT") 101-02; California Penal Code §§ 187(a) and 211.) The jury also found that Petitioner had used a firearm in the commission of the offenses and that the murder was committed during the commission of the robbery. (CT 101-02; California Penal Code §§ 190.2(a)(17) and 12022.5(a)) The trial court sentenced Petitioner to state prison for a term of life without the possibility of parole. (CT 136.)

Petitioner appealed his conviction to the California Court of Appeal which, in an unpublished opinion filed on December 6, 1996, affirmed the trial court's judgment in full. (Return, Ex.

C.) Petitioner then filed a petition for review in the California Supreme Court, which denied the petition, without comment or citation to authority, on March 12, 1997. (Return, Exs. D and E.) On June 16, 1999, while this action was stayed, Petitioner filed a habeas petition with the California Supreme Court. (Return, Ex. F.) That court denied the habeas petition on September 29, 1999, with citations to In re Waltreus, 62 Cal. 2d 218, 225 (1965), In re Lindley, 29 Cal. 2d 709, 723 (1947), and In re Dixon, 41 Cal. 2d 756, 759 (1953). (Return, Ex. G.)

SUMMARY OF EVIDENCE AT TRIAL

The Amended Petition raises, *inter alia*, a claim of insufficiency of the evidence. The disposition of this claim requires a detailed recitation of the facts of the case. The record contains the following evidence.[1]

The Prosecution Evidence:

The Murder And Robbery

In the late evening hours of May 31, 1993, Gerald Ofhgang was driving his truck along Ocean Boulevard in Long Beach, when he observed three young men. Two of the men, who appeared to be light-skinned Hispanic males between the ages of 14 to 17 years old, appeared to be attempting to shake a bicyclist (William Shadden) off his bicycle. One of the Hispanic males was about 5'6" tall, while the other was 5'9". The two Hispanic men forced the bicyclist to stop, by grabbing the bicycle's handles. (Reporter's Transcript ("RT") 97-100, 121-24.) The two Hispanic men knocked Shadden off the bicycle. The taller Hispanic man ran up the sidewalk, and Shadden chased him. The other, shorter, Hispanic man also ran in the same direction but doubled back and again attempted to

[1] The California Court of Appeal made factual findings in its opinion on direct appeal (Return, Ex. C ("State Decision")) which, as discussed *infra*, are entitled to deference. In addition, the Court has independently reviewed the record of Petitioner's trial.

take the bicycle. When the shorter Hispanic man saw Ofhgang slowly approaching in his truck, he dropped the bicycle and ran away. (RT 99-103, 109-110; State Decision at 128-29.)

Ofhgang parked his truck and gathered up Shadden's bicycle as well as his belongings, which had spilled onto the street. He carried them to the corner and waited for Shadden to return. After a moment, Ofhgang discovered Shadden's body approximately 12-13 feet away, partially obscured by iceplant. (RT 103, 110-11; State Decision at 129.)[2]

That same night, at approximately 11:20 p.m., Debra Gray was sleeping in her residence, near Ocean Boulevard, when she was awakened by the sound of gunshots. Gray opened her front door and looked outside. She saw a young, short Hispanic male attempting to pick up a bicycle, who then ran away. She also observed a man in a truck. Before he ran away, Gray heard the Hispanic male say either "We got the fucker" or "We shot the fucker." (RT 79-81, 86-95; State Decision at 128.)

That same night, Ana Bonilla was sitting in a van, which was parked near Ocean Boulevard and La Verne Street in Long Beach. Petitioner, who was 16 years old at the time, and Victor Rodriguez entered the van. Bonilla heard Petitioner and Rodriguez talk about "something" that "had to do with killing or someone was going to be killed." Bonilla testified that Petitioner "could have been" the one who made that statement. Bonilla also heard someone say, "pee on my hand." (RT 138-141, 157-58; State Decision at 129.)[3] Bonilla recalled that she had seen Petitioner in possession of a firearm on a prior occasion.[4] (RT 141.)

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[2] Autopsy results indicated that Shadden died as a result of two gunshot wounds - - one to his chest and the other to his left shoulder. The coroner testified that, due to the absence of sooting or tattooing around the wounds, the gun had been fired from a distance of greater than two feet away. (RT 128-30; State Decision at 129.)

[3] According to Long Beach Detective Craig Remine, urination will wash off gunshot residue, which makes testing for such residue impossible. (RT 209; State Decision at 130.)

[4] Bonilla had heard about a reward for information concerning Shadden's murder. She was interviewed by Detective Remine. (State Decision at 129.)

On September 1, 1993, at approximately 11:30 p.m., Petitioner was arrested at his residence. No gun was found during a search of the residence. (RT 180-84, 200.)

Petitioner's Confession

On September 2, 1993, from approximately 12:20 a.m. to approximately 3:13 a.m., Detective Remine and another detective interviewed Petitioner at the Long Beach police station. At the beginning of the interview, Detective Remine advised Petitioner of his Miranda[5] rights. (RT 168-170.) Specifically, the detective advised Petitioner of, and showed him a form which listed, the following rights: (a) he had the right to remain silent; (2) his statements could be used against him in court; (3) he had a right to talk to an attorney and to have the attorney present during the interview; and (d) he had a right to the appointment of an attorney if he could not afford to hire one. Petitioner stated that he understood these rights and signed the form, acknowledging his understanding and waiving his rights. The two detectives also signed the form. (RT 170-72.)

At first, Petitioner denied that he had been in the area of the murder on the night of Shadden's murder. However, when Detective Remine said that he had information indicating that Petitioner was lying, Petitioner acknowledged that he went to Ocean Boulevard with some other people in a van on the night of the murder. Petitioner stated that some of the other people left the van and tried to steal a bicycle. When they returned to the van, Petitioner heard one of them say that he had shot the owner of the bicycle. (RT 174, 204.)

Petitioner then changed his story. Petitioner described how Rodriguez and another person earlier had stolen a bicycle from the back of a parked van. Afterwards, while the van was moving, Petitioner and the others saw a bicyclist. The van drove down the street and made a U-turn, and Petitioner and Rodriguez exited the van. Petitioner had a .22 caliber handgun

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[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

with him at the time.[6] When Shadden reached them, they tried to steal Shadden's bicycle by grabbing the bicycle as Shadden was riding. Shadden got off the bicycle and ran after Rodriguez. Rodriguez tried to spray Shadden with some mace but was unsuccessful. Shadden then chased after Petitioner. As Shadden got closer and was about to grab Petitioner, Petitioner became afraid. Petitioner pulled out his gun, stuck it under his left arm, and fired off two shots. (RT 175-76; Confession Transcript at 370-72, 376-79.) Shadden turned around and started to chase Rodriguez. Petitioner ran back to the van and got inside. (RT 176-77; Confession Transcript at 373-74; State Decision at 130-31.)

According to Detective Remine, aside from appearing tired, Petitioner did not cry, was not frightened, and did not express any emotion during the interview. (RT 193; State Decision at 130.)[7]

The Defense Evidence:

Petitioner did not testify. The defense presented a clinical psychologist, Marsha Mills, who testified that, based upon his performance on a Wexler Adult Intelligence Scale exam, Petitioner possessed "low average" verbal skills and "average" intellectual ability. (RT 228-29.) Petitioner's school achievement test scores indicated that Petitioner was performing at the bottom 5 to 24 percentile of his grade level. (RT 232-33.)

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[6] At trial, the jury heard an eleven-minute tape recording of Petitioner's confession. (RT 173-74, 177, 193.) Specifically, at the beginning of the recording, the jury heard a detective read Petitioner his Miranda rights from an advisory form. The jury also heard Petitioner acknowledge that he had initialed and signed the form, which stated, *inter alia*, "Any statement I make at this time is free and voluntary, no promise of any reward." (Return, Ex. H (Transcript of Petitioner's Confession on September 2, 1993 ("Confession Transcript") at 369.)

[7] On cross-examination, Detective Remine testified that Petitioner was physically smaller than either of the detectives and was given no food or rest break, and may or may not have been offered water. (State Decision at 131.)

On cross-examination, Mills acknowledged that Petitioner could recognize and acknowledge when his actions were wrong and possessed the capacity to admit to his crime, assuming he had committed one. (RT 235-36.) Additionally, Mills acknowledged that Petitioner possessed the mental capacity to understand his Miranda warning and to waive his rights. (RT 242-43; State Decision at 132.)

PETITIONER'S CONTENTIONS

1. The admission of Petitioner's confession at his trial violated the Fifth Amendment, as his Miranda waiver and confession were involuntary. (Amended Petition at 6.)
2. Petitioner's federal constitutional rights were violated when the trial court admitted Petitioner's confession but precluded the admission of hearsay evidence of Petitioner's mental state at the time of his confession. (Amended Petition at 6.)
3. Petitioner's federal constitutional rights were violated when: (a) the trial court failed to instruct the jury on lesser included offenses and failed to properly instruct the jury on the elements of the charged crimes; and (b) he was convicted based upon insufficient evidence. (Amended Petition at 7.)
4. Petitioner's sentence is cruel and unusual punishment in violation of the Eighth Amendment in light of Petitioner's personal circumstances and the circumstances of the crime. (Amended Petition at 7.)

STANDARD OF REVIEW

This action, filed in this Court on September 23, 1997, is subject to the amendments to the federal habeas corpus statutes contained in the Antiterrorism and Effective Death Penalty Act, effective April 24, 1996 ("AEDPA"). See Duhaime v. Ducharme, 200 F.3d 597, 600 n.3 (9th Cir. 2000) (a habeas

petition filed after April 24, 1996, is governed by 28 U.S.C. § 2254, as amended by the AEDPA).

A. The AEDPA Requirements.

Federal habeas corpus relief is available to a state prisoner only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241, 2254. The AEDPA imposes additional restrictions on the granting of habeas relief to state prisoners with respect to any claim adjudicated on the merits in state court. In such circumstances, the writ "shall not be granted" unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Williams v. Taylor, 529 U.S. 362, 405-11, 120 S. Ct. 1495, 1519-22 (2000).

It is clear that a state court decision cannot be overturned on federal habeas review merely because it conflicts with Ninth Circuit precedent on a federal constitutional issue. The Supreme Court in Williams conclusively opined that "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." 120 S. Ct. at 1523. See also Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir.) ("the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court"), cert. denied, __ U.S. __, 121 S. Ct. 340 (2000).

In reviewing the habeas petition, "[a] federal court must presume the correctness of the state court's factual findings." Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.), cert. denied, __

U.S. __, 121 S. Ct. 627 (2000). The petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1).

Finally, a habeas petitioner is not entitled to relief as a result of a trial error unless the record demonstrates that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). In other words, the petitioner is not entitled to habeas relief unless he can establish that the alleged error resulted in "actual prejudice." Id.

B. Application Of The AEDPA To The Present Proceedings.

Petitioner raised the claims which he asserts in Grounds 1, 2, 3 (first subclaim only, i.e., the instructional error claim), and 4 of the present Amended Petition in his direct appeal before the California Court of Appeal. (Compare Amended Petition at 6-7 with Return, Ex. B.) The California Court of Appeal reached the merits of these claims when, through the State Decision, it issued a written, reasoned decision addressing each claim. (Return, Ex. C.) The California Supreme Court also reached the merits of these claims when it denied Petitioner's petition for review without comment or citation to authority. See Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992). Accordingly, to determine the reasonableness of the California Supreme Court's decision on these claims, this Court must analyze the written opinion of the California Court of Appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991) ("where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting that same claim rest upon the same ground"). Thus, in conducting habeas review of the above-noted claims, this Court must apply the deferential standards of review articulated in 28 U.S.C. § 2254(d).

Petitioner raised the second subclaim of Ground 3 -- his sufficiency of the evidence claim -- through his habeas petition filed with the California Supreme Court in 1999. The California Supreme Court apparently denied that habeas petition on procedural grounds, given the citations indicated in the court's otherwise silent denial order. (Return, Ex. G.) In light of the nature of the state high court's denial of this claim, there is no basis to review that court's "application" of federal law under 28 U.S.C. § 2254(d). See Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000). Thus, although *de novo* review of this claim is not required under the AEDPA, this Court must conduct "an independent review of the record . . . to determine whether the state court clearly erred in its application of controlling federal law." Id. at 982.

II. The State Courts Did Not Err In Finding Petitioner's Confession To Be Voluntary.

In his first claim, Petitioner argues that his Miranda waiver and his confession were involuntary and, therefore, the admission of his confession violated the Fifth Amendment. (Amended Petition at 6.)

A. Applicable Law.

The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The Unites States Supreme Court, in Miranda, held that the Fifth Amendment privilege against self-incrimination bars the prosecution from using statements stemming from custodial interrogation unless the defendant was first warned of his constitutional rights. See Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528-29 (1994). The Miranda safeguards apply when law enforcement officials initiate questioning after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Miranda, 384 U.S. at 444, 86 S.

Ct. at 1612; see Stansbury, 511 U.S. at 322, 114 S. Ct. at 1528. However, the police can interrogate a suspect if he or she voluntarily, knowingly, and intelligently waives his or her constitutional rights. Patterson v. Illinois, 487 U.S. 285, 292, 108 S. Ct. 2389, 2394-95; Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1140-41 (1986).

Recently, in Dickerson v. United States, 530 U.S. 428, 432, 120 S. Ct. 2326, 2331 (2000), the United States Supreme Court confirmed that Miranda and its progeny continue to govern the admissibility of statements made by a criminal defendant while in police custody. The Court reaffirmed that such statements are admissible only if the defendant was first warned that he has "'the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that is he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (quoting from Miranda, 384 U.S. at 479, 86 S. Ct. at 1630.)

A criminal suspect, however, need not "know and understand every possible consequence of a waiver of the Fifth Amendment privilege," but need only understand that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." Colorado v. Spring, 479 U.S. 564, 574, 107 S. Ct. 851, 857 (1987) (citations omitted).

B. The Suppression Hearing.

Prior to trial, Petitioner moved to suppress his confession. (RT 5.) The trial court conducted an evidentiary hearing, pursuant to California Evidence Code § 402, to determine whether Petitioner's confession should be suppressed on the ground that he had been coerced into making it. Detective Remine, Petitioner and Arthur Close, an attorney whom Petitioner called from the police station following his confession, testified at the hearing. (RT 5-71.)

According to Detective Remine, at the beginning of the interview, he advised Petitioner of his Miranda rights. Petitioner was shown, and had read verbally to him, an advisement form listing his Miranda rights, which he signed. The detectives also signed the form. Petitioner stated that he understood his rights and that he waived them. (RT 17-21, 26-27.)[8] Neither Petitioner's parents nor his attorney were present during the interview. At no time during the interview did Petitioner cry, sleep, ask to speak to his mother, ask to use a telephone or ask for permission to call his attorney. (RT 15-17, 21, 25.) Petitioner told the detectives two different stories. The detectives obtained Petitioner's permission to tape record the second story, in which Petitioner confessed to Shadden's murder. (RT 17-18.) Before taping the interview, the detectives again went over the advisement of legal rights form with Petitioner. The tape of that additional advisement was played at the suppression hearing. (RT 27-28.)

According to Petitioner's testimony at the suppression hearing, as he was being transported to the police station, he asked if he could call his mother when they arrived and was told that she would be notified for him. (RT 32.) Petitioner was left alone in the interview room for 20 minutes prior to being interviewed by the two detectives. Once the detectives entered the room, when Petitioner inquired what he had been arrested for, the detectives said "you know" and one of them showed him a ring with the number "187." Petitioner was confused and did not understand what was happening. Petitioner was told that he had been arrested on the charge of murder. (RT 33-35.) Shortly thereafter, Petitioner asked to speak to an attorney for advice. The detectives told him that "it wouldn't be possible" to do so. (RT 35, 40-43.) Petitioner then asked to speak to his mother. Again he was told that he could not do so. (RT 36.)

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[8] At the January 12, 1994 preliminary hearing, Detective William MacLyman read into the record the text of the advisement form provided to and initialed by Petitioner, which states each of the Miranda rights. (CT 8-9.)

Petitioner testified that Detective Remine's partner drew a short line on a piece of paper and then said, "if you keep telling us you didn't do it, you are going to jail for the rest of your life," and drew a long line. (RT 43-45.) Petitioner claimed that the detectives left the interview room several times, leaving him alone in the room for up to 40 minutes. (RT 45.)[9] Petitioner felt tired, scared, and sleepy, and was not offered any food or drink. (RT 46.) Petitioner wanted to use the phone to call his mother or a lawyer but the detectives kept telling him he could do so only when "everything was over." (RT 46.)[10] Petitioner finally decided that, in order to be able to make a phone call and because he was tired and scared and wanted to leave, he would tell the detectives the story that he believed they wanted to hear and "get it straightened out" later. (RT 46-49.) Petitioner agreed to allow the detectives to record his confession because they said that he could use the telephone following the recording. (RT 48.) He testified that every one of his statements on the recording were "lies" based on what the police told him to say, and that he made these false statements in order to gain telephone access. (RT 51-57.)

Petitioner testified that he simply was given the advisement form and told to sign it, and the form was not read to him. Petitioner signed and initialed the form without reading it. He believes this occurred after his confession. (RT 36-40.) When the detectives admonished Petitioner regarding his Miranda rights, Petitioner just agreed to what they were saying because he wanted to "get out of the room and make a phone call." (RT 40.) He testified that, although he could hear the advisements given to him, he wasn't paying attention or comprehending and, therefore, "lied" when he told the police he understood his rights. (RT 50.)

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[9] Detective Remine testified that the detectives never left Petitioner during the interview and that, if one of them left the room, the other stayed with Petitioner. (RT 16.)

[10] Petitioner admitted that the police had not hit him, kicked him, put a gun to his head or otherwise threatened to hurt him in any way. (RT 56.) However, they told him he could not make a phone call to an attorney. (Id.)

Close testified that he received a five-minute telephone call from Petitioner during the early morning hours of September 2, 1993. (RT 58, 60.) Petitioner was in tears and highly agitated as he told Close that he had just confessed to a murder. Petitioner said that he had confessed because he had not been allowed to talk to his mother or an attorney, despite requests to do so, and made the confession in order to make a phone call. (RT 60-63.) Petitioner described how one of the detectives showed him a ring with the numbers "187" and drew lines on a piece of paper to illustrate "the consequences" should he confess or not. (RT 61.)

Detective Remine acknowledged that the other detective wore a ring with the numbers "187," but did not recall whether that detective ever showed Petitioner the ring. (RT 21-22.) Additionally, he did not recall that either he or his partner drew a short line and a long line on a piece of paper and showed the paper to Petitioner, and denied advising Petitioner that they represented the time he would spend in jail, depending on the "route" he took. (RT 22-24.)[11]

Defense counsel argued that the confession should be suppressed on two grounds: first, that it was involuntary and, second, that its admission violated Miranda. (RT 63-68.) The prosecution argued that Petitioner's testimony, if believed, confirmed that his statements made on tape were freely and voluntarily made. The prosecution also argued that Petitioner's contention that he asked to call his attorney before confession is inconsistent with his statements made on tape and his signature on the advisement form, i.e., that Petitioner would not have made such statements and signed that form it, in fact, his request to call counsel was being denied. (RT 68-70.)

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[11] At trial, Detective Remine denied that his partner ever showed Petitioner a gold ring with the number "187" (the California Penal Code murder statute) on it and stated, "This is what you are here for." (RT 196.)

C. The State Court Decisions.

At the conclusion of the suppression hearing, the trial court ruled that Petitioner's confession was admissible, as it was voluntary and Petitioner had waived his Miranda rights:

> Obviously, the court has to do some things regarding findings of fact in this case, because we have such very significant differences in the testimony of two witnesses in particular here.
>
> . . . .
>
> I am a fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer Ramine [sic] and not the testimony of the defendant in this case. Not only because it is the defendant in this case, but for other reasons, which were the nature of the facts that were developed by both sides. Leading me, in addition, to my feelings about who I should believe and who I really do believe, but also, why I should believe as a secondary or perhaps a primary, to look at with that crediting officer Ramine's [sic] testimony. It now sheds light upon the decision.
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> [Defense counsel] makes the best case, of course, it is made primarily by the testimony of a witness I do not credit in this case. I find there was no violation of Miranda, the Miranda rights were given ahead of time, when they have been given before incriminating statements were given. I find it is voluntary under the case law, that has developed on this whole issue, hundreds and hundreds of cases, actually, on this issue just like search and seizure, so I find it is both not a violation of Miranda, [and] voluntary, I decline to suppress the statements that were given by the defendant to the officers in this case.

(RT 70-71.)

On appeal, the California Court of Appeal rejected the present claim asserted by Ground One. After reviewing the evidence presented at the suppression hearing, the state appellate court concluded that the fact that Petitioner's testimony contradicted that of Officer Remine was not a basis for reversal, noting that "[t]he trial court explicitly found Officer Remine, and not defendant, to be the credible witness" and concluding that "[t]he evidence found credible by the trial court supports the determination that the waiver and confession were voluntary." (Return, Ex. C at 133-35.) The California Supreme Court adopted the lower court's decision through its silent denial of review.

D. Analysis

As previously mentioned, in general, this Court "must presume the correctness of the state court's factual findings." 28 U.S.C. § 2254(e)(1); Bains, 204 F.3d at 972 (ultimate issue of whether defendant was "in custody" for Miranda purposes is subject to *de novo* review, but the state court's underlying factual determinations are entitled to a presumption of correctness). See also Saelee v. Mayle, 2000 WL 288441, at *12 n.4 (N.D. Cal. March 10, 2000) (recognizing that pre-AEDPA case law -- "holding that a federal habeas court must independently consider the voluntariness of a confession rather than defer to the state court's findings" -- may no longer be good law "in light of the increased amount of deference now required under 28 U.S.C. § 2254(d), as amended by the AEDPA") (citations omitted). This presumption adhered to state court findings regarding witness credibility. Bains, 204 F.3d at 972 (with respect to Miranda-based habeas claim, "the state trial court's 'scene- and action-setting questions' (i.e., the underlying factual questions) still are entitled to a presumption of correctness," citing to Thompson v. Keohane, 516 U.S. 99, 111-12, 116 S. Ct. 457 (1995)). See generally, Anderson v. City of Bessemer, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985) ("[O]nly the trial judge can be aware of the variations in

demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995) ("There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility."); United States v. Hood, 493 F.2d 677, 680 (9th Cir. 1974) (trial judge in unique position to observe witnesses' demeanor while appellate court only has "the cold record, which is sterile in comparison").

Here, Petitioner has failed to demonstrate, by clear and convincing evidence, that the trial court's factual findings regarding credibility, and attendant factual findings regarding the voluntariness of Petitioner's confession and Miranda waivers, are not entitled to the presumption of correctness which they are afforded by 28 U.S.C. § 2254(e)(1). Therefore, crediting the state court's factual findings, this Court concludes, as it must, that Petitioner's confession was voluntary and that his waiver of his Miranda rights was a valid waiver.

The totality of circumstances here, based on the Court's independent review of the record, reveals that Petitioner voluntarily confessed. Notwithstanding Petitioner's attempt to impugn Detective Remine's testimony as a series of "I don't recall answers" (Traverse at 9), the Court's review of the record reveals that the detective's testimony established an adequate basis for the trial court to find Petitioner's confession to be voluntary and his Miranda waiver to be valid. There is no question that Petitioner repeatedly was advised of, and waived, his Miranda rights. Although Petitioner attempted, at the suppression hearing, to ameliorate the effect of his conduct by asserting that he was not paying attention and/or comprehending, there is no basis in the record for concluding that he did not both understand the advice given to him and voluntarily choose to waive those rights. The fact that Petitioner was 16 at the time does not change the Court's conclusion on the record before it. Moreover, under Petitioner's testimony, he made the choice to "lie"and confess. In short, whether or not Petitioner's confession reflected the truth, it was not involuntary.

Petitioner has not established that the decisions of the California courts rejecting Ground One were contrary to, or an unreasonable application of, clearly established Federal law as explicated by the Supreme Court. He also has not established that those state court decisions were based on an unreasonable determination of the facts in light of the evidence presented. Hence, he is not entitled to federal habeas relief under 28 U.S.C. § 2254(d)(1) or (2), and Ground One must be denied and dismissed with prejudice.

III. The Exclusion Of The Close Testimony Does Not Warrant Federal Habeas Relief.

By Ground Two, Petitioner contends that his federal constitutional rights were violated when, after admitting his confession, the trial court then precluded the admission of hearsay evidence which assertedly would establish his mental state at the time of his confession. (Amended Petition at 6.) Specifically, Petitioner alleges that the trial court should have admitted the testimony of Close regarding how Petitioner "was upset when he called him and told him that he had just falsely confessed to the charged crime due to promises and threats the police had made to him." (Id.)

A. The State Decisions.

Prior to the presentation of the defense case, defense counsel advised the trial court that he wished to present Close's testimony regarding the telephone call he received from Petitioner after he had confessed, which he proffered would be similar to the testimony given by Close at the suppression hearing, as described above. Defense counsel argued that the testimony was admissible under California Evidence Code § 1250[12] as evidence of Petitioner's pre-existing state of mind

[12] Section 1250 provides:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling,

when he made his confession. (RT 212-14.) The trial court observed:

> And that way, you are able to avoid putting your client on the stand, in so far [sic] as having him tested by cross-examination of what his intent was, and what was going through his mind when he made this claimed false confession, and you think that 1250 really allows that, for the truth of the statement to the attorney that it was a false confession.

(RT 213-14.) After hearing further argument, the trial court ruled that the proffered Close testimony was hearsay which was not admissible under Section 1250 because it was "evidence of a statement of memory or belief to prove the fact of memory or belief" and that Section 1250 was inapplicable. (RT 214-15.) The trial court further concluded that, without more, the testimony was irrelevant. (RT 215-16.) Finally, the trial court ruled that the Close testimony was excludable under California Evidence Code § 352 because, without the critical testimony from Petitioner as to his existing mental and physical state, the probative value of the Close testimony was outweighed by prejudice. (RT 216.)

The trial court noted that its ruling was without prejudice because "there certainly is a very clear way that [the evidence] would be admissible, but I haven't been proffered that." (RT 216.) In response, defense counsel did not offer any additional basis for admitting the testimony. (Id.) It appears that the court

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pain, or bodily health) is not made inadmissible by the hearsay rule when:

> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed. (Emphasis added.)

may have been alluding to the prior state of mind exception to the hearsay rule codified in California Evidence Code § 1251,[13] which the California Court of Appeal addressed, as discussed below.[14]

On appeal, Petitioner argued that: the Close testimony was relevant and was not excludable under California Evidence Code § 352; the Close testimony was not inadmissible hearsay as it was not offered for the truth of the statement but, instead, as circumstantial evidence of Petitioner's state of mind; even if the testimony was hearsay, it was admissible under California Evidence Code § 1250; and, finally, even if the testimony were inadmissible hearsay, Petitioner nonetheless had a due process right to present it as exculpatory evidence. (Return, Ex. C at 34-42.)

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[13] California Evidence Code section 1251 provides:

> Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:
>
> (a) The declarant is unavailable as a witness; and
>
> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

[14] The Court notes that Petitioner, in his Traverse and for the first time, raises a claim that the trial court should have admitted the Close testimony under California Evidence Code § 1240. (Traverse at 12.) Section 1240 reflects the "spontaneous declaration" exception to the hearsay rule, *to wit*, for spontaneous statements made purporting to narrate, describe or explain an act, condition or event perceived by the declarant and made while the declarant is under the stress of excitement caused by such. Petitioner failed to present this claim to the California Supreme Court, whether through his petition for review or his habeas petition. (See Return, Exs. D and F, *passim*.) Petitioner did not raise this claim in his Amended Petition. The Court will not consider a claim raised for the first time in a Traverse. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994); Lewis v. Witek, 927 F. Supp. 1288, 1291 n.2 (C.D. Cal. 1996). Moreover, because this claim had not been presented to the California Supreme Court, it is unexhausted and cannot be considered. 28 U.S.C. § 2254(b)(1)(A).

The California Court of Appeal rejected each of Petitioner's arguments and concluded that the trial court properly excluded Close's testimony. With respect to Petitioner's contention that the testimony was admissible under Section 1250, the court observed that the statute applies only to a declarant's present mental state, as opposed to his mental state prior to the statement:

> By its terms, Evidence Code section 1250 is inapplicable to this case. Defendant telephoned Close after the interrogation was finished. His state of mind after the interrogation is not an issue in this case, nor does the evidence suggest there was a continuing mental state which carried over from the taped confession through the subsequent telephone call. On the contrary, we presume the taped confession was devoid of any such display of emotion, given defendant's failure to bring any such display to our attention in his appellate briefs or to the jury's attention below.

(State Decision at 136-37.) The California Court of Appeal also concluded that the Close testimony was not admissible under the prior state of mind exception embodied in California Evidence Code § 1251 because Petitioner was not unavailable as a witness. As the court noted, the fact that Petitioner had exercised his privilege against self-incrimination did not render him "unavailable," under California law, for purposes of this hearsay exception. (Return, Ex. C at 137-38.)

The California Court of Appeal also rejected Petitioner's contention that the Close testimony was relevant and should have been admitted pursuant to the Supreme Court's decision in Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142 (1986). As the court noted, in Crane, the trial court excluded the entire police officer testimony regarding the length of the defendant's interrogation and the manner in which it was conducted.

> *Crane* is distinguishable. In this case, defense counsel extensively cross-examined Remine concerning the manner in which the confession was secured. Factors including the size of the room, the length of the investigation, the lack of food and rest, the late hour, the defendant's age and smaller size, and the absence of his parents and attorney were all brought out for the jury's evaluation. The exclusion of Close's testimony regarding a post-interrogation telephone conversation is not the equivalent of the exclusion of the officers' testimony in *Crane* regarding the manner in which the confession was obtained.

(State Decision at 138.)

Finally, the California Court of Appeal addressed, and rejected, Petitioner's contention that his due process rights were violated because he was deprived of his ability to present exculpatory evidence and that the state hearsay rule must give way to his federal due process right.

> [T]his was not an instance where a state rule of evidence unfairly abridged a defendant's constitutional right to due process. Close's excluded testimony regarding the post-interrogation conversation was not the sole evidence of what went on in the interrogation room. Remine's cross-examination testimony regarding the manner in which the interrogation was conducted and the taped confession itself provided the jury with the evidence which defendant erroneously contends was missing at trial. Defendant's post-interrogation conversation with Close in which he described his prior state of mind was self-serving and "made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code § 1252.)

(State Decision at 139.)

The California Supreme Court rejected Petitioner's arguments in support of Ground Two without comment and,

therefore, did so based on the same reasons set forth in the State Decision.

B. Applicable Law.

As a threshold matter, federal habeas corpus relief generally does not lie for alleged errors of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, (1991); Engle v. Isaac, 456 U.S. 107, 121 n.21, 102 S. Ct. 1558, 1568 n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process . . . . If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'") (citation omitted).

In short, this Court cannot reexamine the California Court of Appeal's above-described determination (as well as the California Supreme Court's subsequent decision on the same basis) on the state law question which Petitioner presents by Ground Two, i.e., whether the Close testimony should have been admitted under California Evidence Code § 1250 and/or § 1251. As noted above, both the trial court and the California Court of Appeal found the testimony to be unreliable hearsay -- a finding confirmed by California's highest court. Under California law, the assessment of the reliability of hearsay evidence is a finding of preliminary fact (California Evidence Code § 405) which, therefore, is presumed correct under 28 U.S.C. § 2254(e)(1), absent clear and convincing evidence otherwise. Petitioner has not presented any basis for upsetting that presumption here. Hence, that determination must be presumed to be correct. For that reason, as well as the other reasons set forth in the California Court of Appeal's opinion, this Court must conclude that the trial court's exclusion of the

Close testimony fully comported with California law, including California Evidence Code §§ 1250 and 1251.

"It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." Spivey v. Rocha, 194 F.3d 971, 977 (9th Cir. 1999); see also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) ("failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief"). Here, of course, there was no failure to comply with California's evidentiary rules. The question then is whether -- despite the state court's compliance with California law -- Petitioner nonetheless can establish any federal violation sufficient to invoke a right to federal habeas relief.

Petitioner contends here, as he did in the California courts, that the Supreme Court's Crane v. Kentucky decision mandated admission of the Close testimony. The Court concludes that the California courts' application of the Crane decision, as explained by the California Court of Appeal (State Decision at 138), was clearly reasonable. In Crane, the Supreme Court that the "wholesale exclusion" of all evidence regarding the physical circumstances of the defendant's confession, including through non-hearsay interrogating officer testimony, violated his due process right to present a defense by attacking the reliability of his confession. 476 U.S. at 690-91, 106 S. Ct. at 2147.

In marked contrast, in this case, there was no such "wholesale" denial. As the California Court of Appeal observed, defense counsel extensively cross-examined Detective Remine about the circumstances of the confession. (See RT 183-98, 202-06.) Additionally, the trial court expressly ruled, over the prosecution's objections, that the defense could present the testimony of Mills, a psychologist, regarding Petitioner's intellectual capacity for the express purpose of affording defense counsel a basis for arguing that the confession was coerced and involuntary and the jury should find that the confession lacked reliability. (RT 218-21, 223-25.)

The trial court also agreed to give, over the prosecution's objections, two special instructions proffered by defense counsel pertaining to the reliability of Petitioner's confession in light of the circumstances under which it was given. (RT 250-63; CT 54-55.) Defense counsel led his closing argument with a lengthy and vigorous attack on the circumstances of the confession, arguing that the jurors should find the confession to be coerced, involuntary, and unreliable. (RT 296-301.) The jurors thus had before them evidence of the allegedly coercive circumstances which resulted in Petitioner's confession and received instruction which directed them to consider such circumstances (e.g., Petitioner's age, education, physical and mental condition, treatment while in custody, etc.) in determining the believability of Petitioner's confession, including a direction that they were "at liberty to disregard" the confession if they found it to be "unworthy of belief." (RT 275; CT 54-55.). In short, Petitioner had the opportunity to present non-hearsay evidence regarding the physical circumstances of his confession -- the opportunity denied the defendant in Crane. Petitioner's complaint that he was not allowed to present additional, unreliable hearsay testimony regarding his own self-serving statements after the confession does not implicate the Crane decision or any good faith extension of its holding.

Finally, the Court concludes that the California courts did not err in rejecting Petitioner's argument that, even if the Close testimony was inadmissible hearsay, he nonetheless has a constitutional right to present the evidence. "The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing to Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038 (1973), and Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920 (1967)). As the Supreme Court has explained, however, the import of these holdings

> is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 2022 (1996) (plurality opinion). "[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." Id. at 42, 116 S. Ct. at 2017. As the Supreme Court repeatedly has made clear, state evidentiary rules which authorize the exclusion of unreliable, overly prejudicial or cumulative evidence do not violate a defendant's due process rights, including state hearsay rules which prohibit the admission of evidence found to be insufficiently reliable. Id. See also Crane, 476 U.S. at 690, 106 S. Ct. at 2146 ("[W]e have never questioned the power of the States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see the evidence admitted."); LaGrand v. Stewart, 133 F.3d 1253, 1266 (9th Cir. 1998) (concluding that, although various Supreme Court decisions "stand for the proposition that states may not impede a defendant's right to put on a defense by imposing mechanistic . . . or arbitrary . . . rules of evidence," "they do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses.").

Here, the Close testimony was excluded pursuant to such a constitutionally acceptable hearsay rule, i.e., due to a failure to meet the exception embodied in California Evidence Code § 1250. Petitioner has failed to demonstrate that the exclusion of the Close testimony pursuant to this statute, or otherwise,[15] was

[15] As discussed above, Petitioner has contended that the trial court should not have found the testimony excludable under California Evidence Code § 352. Section 352 permits a trial judge to exclude relevant evidence when its probative value is outweighed by potential prejudice. Here, the California courts properly rejected Petitioner's argument that Crane v.

even erroneous, let alone a violation of due process or her right to present a defense. As the California Court of Appeal observed, Petitioner was not prevented from presenting his defense that his confession was involuntary and unreliable. Rather, the trial court merely required that he present his defense through evidentiary submissions which complied with California's evidentiary rules -- a requirement to which all litigants, whether prosecution or defendant, are subject and one which hardly can be said to be constitutionally infirm, as the Supreme Court confirmed in Egelhoff.

Petitioner has not shown that the exclusion of the Close testimony was erroneous, much less that the effect of the alleged error rendered his trial fundamentally unfair or deprived him of a defense. In sum, he has not demonstrated that the California courts erred in excluding the Close testimony. The California Court of Appeal correctly applied Supreme Court precedent when it affirmed the trial court's decision to exclude the Close testimony. Accordingly, Ground Two does not warrant federal habeas relief and should be denied. 28 U.S.C. § 2254(d)(1).

IV. Petitioner's Claim Of Instructional Errors And Conviction On An "Uncharged" Offense Does Not Warrant Federal Habeas Relief.

By Ground Three, Petitioner raises two different claims. His second claim (insufficiency of the evidence) is addressed, *infra*, in Section V. His first claim is that he was denied his federal constitutional rights when the trial court: denied his counsel's request for jury instructions on second degree murder[16]; failed

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Kentucky rendered the Close testimony relevant. Hence, there certainly was no impropriety in excluding testimony whose relevance was marginal if non-existent under Section 352 when, in the trial court's view, its prejudice outweighed its probative value.

[16] Defense counsel asserted that "a possible theory that the jury could adopt is that this murder occurred for reasons other than robbery, for any reason that came out of a brutal attack" and that a second degree murder instruction, therefore, "could be appropriate." (RT 245-47.) The trial court

to *sua sponte* instruct on premeditated murder and voluntary manslaughter; and instructed the jury on felony-murder, a purportedly "uncharged" offense, and allowed him to be convicted of felony-murder. (Amended Petition at 7 (incorporating Petitioner's arguments made in his state appeal; see Return, Ex. E at 315-331).) He argues that second degree murder and voluntary manslaughter were "lesser included offenses" of the crime with which he was actually charged, premeditated murder, and that, therefore, he was entitled to have the jury instructed as to such possible bases for conviction. (See, Return, Ex. E at 315-322.) Petitioner further argues that the jury should not have been instructed, and he could not have been convicted, based on a theory of felony-murder as the information charged him only with "malice murder," which he claims is a "separate offense." (Id. at 323-331.)

A. Petitioner's Contention That He Was Convicted Of An Uncharged Offense, Felony-Murder, And That The Jury Should Not Have Been Instructed As To Felony-Murder, Is Meritless.

On appeal to the state courts and in his habeas petition to the California Supreme Court, Petitioner argued that he had been charged only with first degree "malice murder," that malice murder is a "separate crime" from first-degree felony murder, and that, by providing the jury with only felony-murder instructions and no instructions on malice murder, the trial court instructed the jury on an uncharged crime and allowed the jury to convict him of an uncharged crime. He raises that same claim here as a subclaim of Ground Three.

The California Court of Appeal flatly rejected Petitioner's arguments, including his contention that he had not been charged with felony-murder:

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disagreed, concluding that a reasonable jury, if it found Petitioner guilty at all, could only find that this was a murder committed in the course of a robbery and was of the first degree. He therefore declined to give a second degree murder instruction and defense counsel raised no further argument. (RT 247.)

> The information . . . alleged both the premeditated malice murder of William Shadden on May 31, 1992, and the second degree robbery of the same victim on the same date, both with the personal use of a firearm. In addition, the murder count expressly alleged that the murder was committed while the defendant was 'engaged in the commission of the crime of Robbery, within the meaning of . . . section 190.2[subd.](a)(17)." Although the information did not mention [California Penal Code] section 189, the allegations were nevertheless sufficient to put defendant on notice that he was being charged with a murder that occurred during the commission of a robbery, or felony murder. Moreover, a defendant charged with malice murder may be convicted upon a theory of felony murder. It is not necessary that an information charging murder with malice must also expressly charge a felony murder under section 189. (*People v. Scott* (1991) 229 Cal. App. 3d 707, 712-718.) There was no due process violation.

(State Decision at 141-42.) The state court specifically rejected Petitioner's contention that, because the information explicitly referenced California Penal Code § 187(a) (premeditated murder with malice aforethought) but did not explicitly cite to California Penal Code § 189 (felony-murder), he was charged only with malice murder and had been convicted of an uncharged offense. Noting that the California statutes specifying the matters which must be contained within an information do not require "that the statute which the accused is charged with violating be designated by number," the state court concluded that "it would have been sufficient to allege that defendant had murdered Shadden, without specifying the degree." (State Decision at 142-43 (citations omitted).)

In short, the state courts found that Petitioner's argument rests on a fatally flawed assumption, i.e., that there had been an actual failure to adequately charge him with felony-murder. Having reviewed the record and applicable California law, and

for the reasons stated by the California Court of Appeal, the Court agrees.

The information alleged that Petitioner murdered Shadden while he was "engaged in the commission of the crime of Robbery." The information also charged that Petitioner committed the crime of second degree robbery, along with first degree murder. (CT 24.) It is long established under California law that a defendant charged with premeditated murder may be convicted based upon a theory of felony-murder. See People v. Wilkins, 26 Cal. App. 4th 1089, 1096, 31 Cal. Rptr. 2d 764, 769 (1994) (rejecting claim that, because information charged defendant with malice aforethought murder consistent with Penal Code § 187, defendant was improperly convicted of "an uncharged and separate offense, felony murder"); People v. Scott, 229 Cal. App. 3d 707, 712-18, 280 Cal. Rptr. 274, 277-81 (1991) (rejecting the same argument made by Petitioner here and noting that the proposition that a defendant can be convicted of felony-murder even though the information charged murder with malice has been the law in California since at least 1915). See also Stephens v. Borg, 59 F.3d 832, 935 (9th Cir. 1995) (citing People v. Gallego, 52 Cal. 3d 115, 276 Cal. Rptr. 679 (1990), for the "well established rule that 'a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory'"). The information at issue here adequately charged Petitioner with felony-murder under well-established California law. Petitioner has not shown otherwise, and the very argument he presently makes was soundly and specifically rejected in Scott, *supra*.[17]

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[17] In particular, the court explicitly addressed at length and rejected the argument, made by Petitioner, that the California Supreme Court's decision in People v. Dillon, 34 Cal. 3d 441, 194 Cal. Rptr. 390 (1983), somehow changed the longstanding California law in this respect. Scott, 229 Cal. App. 3d at 713-18, 290 Cal. Rptr. at 277-81. That *premeditated murder and felony-murder may be "separate" crimes does not* vitiate the adequacy of the information here, under California law and as acknowledged by the Ninth Circuit.

Moreover, Petitioner received adequate notice, consistent with the Sixth Amendment and due process, that he was being tried for felony-murder. The prosecutor's brief opening statement argued only a felony-murder theory, not a malice murder theory. (RT 74-75.) Evidence was presented at trial to support the robbery charge. (RT 97-103, 119-20, 123-24.) The prosecution requested only that felony-murder and robbery instructions be given. (CT 62-64, 69-72.) As the prosecution was proceeding only on a theory of felony-murder -- a theory which was adequately charged by the information and which did not reflect an "uncharged offense," Petitioner's assertions notwithstanding -- and as defense counsel did not request that the jury be instructed with "malice murder" instructions,"[18] there was no error of any kind on the trial court's part in instructing the jury based on a felony-murder theory and not on a malice murder theory. See Stephens, 59 F.3d at 935 ("under clear California law, the jury may be instructed on felony murder even though the indictment does not expressly set out such a theory"). There simply was not a failure to instruct on any element of a charged offense, as the case was one pursued solely as a felony-murder offense. For the same reasons, Petitioner was not deprived of any constitutional rights when he was convicted under the felony-murder theory rather than under a "malice murder" theory. Id., at 935-36 (when defense counsel received notice that prosecution would request felony-murder instructions while defense case was proceeding, five days before closing arguments, defendant received constitutionally adequate notice and was not to entitled to habeas relief); Morrison v. Estelle, 981 F.2d 425, 428 (9th Cir. 1992) (petitioner received constitutionally adequate notice of felony-murder theory when the prosecution presented evidence of robbery and requested felony-murder instructions at the initial instructions conference two days before closing arguments).

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[18] As noted above, defense counsel only requested second degree murder instructions. (See CT 88-90.) For the reasons set forth below, Petitioner may not obtain habeas relief based on the trial court's failure to grant his counsel's request.

This subclaim of Ground Three -- i.e., Petitioner's contention that he was convicted of an uncharged offense in violation of the Constitution, following improper felony-murder instructions rather than "malice murder" instructions -- is factually and legally devoid of merit. The California courts did not err in rejecting, and Petitioner is not entitled to habeas relief based on, this subclaim. 28 U.S.C. § 2254(d)(1) and (2).

B. Petitioner's Claim That He Was Entitled To Lesser Included Offense Jury Instructions Is Not Cognizable.

By his second instructional error subclaim, Petitioner argues that second degree murder and voluntary manslaughter are lesser included offenses of felony-murder and that, as a result, he was entitled to have the jury instructed on these theories.

Last year, the Ninth Circuit reaffirmed its adherence to its holding in Bashor v. Risley, 730 F.2d 1228 (9th Cir. 1984), that "the failure of a state court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (citations and internal quotations omitted); see also Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1999); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988); James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976).

In Solis, the Ninth circuit summarized the United States Supreme Court precedent on the present issue as follows:

> In 1980, the [United States] Supreme Court held that a defendant in a capital murder case has a constitutional right to have the jury instructed on a lesser included offense in certain instances. *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Supreme Court explained that when a jury is given only two options, "not guilty" and "guilty of capital murder,"

> even though the evidence would support an instruction on a lesser included offense, the risk that the jury will convict although it has reasonable doubt is too great and a third option, namely a lesser included, non-capital offense instruction, is required. *Id.* In a footnote, the Court expressly reserved judgment on "whether the Due Process Clause would require the giving of such instructions in a non-capital case." *Id.* at 638 n.7.

Solis, 219 F.3d at 928.

Continuing on, the Ninth Circuit noted that the high court's silence on the question of whether Beck applied to non-capital cases has resulted in a split among the circuits on the issue. Solis, 219 F.3d at 928-29; see Turner, 63 F.3d at 819 (acknowledging an "intercircuit split" regarding whether a claim of failure to instruct on a lesser included offense raises a question of constitutional dimension). The Ninth Circuit concluded that the rule of Teague v. Lane, 489 U.S. 288, 109 S. Ct. 10160 (1989), "barred [the federal courts] from changing the law regarding failure to instruct errors in the context of a habeas petition" and that Bashor and its predecessors remain controlling on this issue with respect to cases arising in this Circuit. Solis, 219 F.3d at 929.[19]

Petitioner argues that, nonetheless, he is entitled to habeas relief because the lesser included offense instructions were needed "to present his theory of the case." (Traverse at 14.) In Solis, as in Bashor, the Ninth Circuit recognized that a cognizable claim might be stated when a trial court has refused to instruct on lesser included offenses and those offenses are consistent with a defendant's theory of the case. 219 F.3d at 922. However, the court found that no such claim has been stated on the facts before it, as the evidence presented at trial

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[19] The Ninth Circuit, in Turner, determined that a finding of constitutional error in a non-capital case due to the failure to instruct on a lesser included offense would constitute a new rule of law, in violation of the Teague doctrine. 63 F.3d at 819. See generally Bell v. Hill, 190 F.3d 1089, 1090-91 (9th Cir. 1999) (noting that a habeas petitioner cannot benefit from a "new" rule and discussing application of Teague).

did not support the requested lesser included offense charges.

Petitioner has not articulated any basis for finding that his "theory of the case" encompassed second degree murder and voluntary manslaughter, and the Court's review of the record reveals none. Defense counsel did not make an opening statement at the start of trial and declined to do so at the start of the defense case. (RT 75, 227; CT 40-41.) Petitioner did not testify. The only defense witness presented was Mills, the psychologist, whose testimony was presented for the sole purpose of affording defense counsel a basis for arguing to the jury that Petitioner's confession was unreliable. (See RT 218-25.) In his closing argument, defense counsel argued only two matters: first, and principally, he endeavored to attack the reliability of Petitioner's confession in light of the circumstances under which it was given; and second, and to a lesser extent, he asserted that there was no physical evidence linking Petitioner to the crime and attacked the reliability of the Ofhgang and Bonilla testimony. (RT 295-305.) Defense counsel did not argue to the jury any facts or theory which might encompass second degree murder or voluntary manslaughter. Rather, in essence, he simply endeavored to convince the jury that Petitioner was not the perpetrator and confessed due to coercion. (Id.)

Petitioner has not established, and cannot establish on this record, that his "theory of the case" was second degree murder and/or voluntary manslaughter and that he was deprived of presenting his theory through the trial court's failure to instruct on these asserted lesser included offenses. His counsel did not urge that voluntary manslaughter instructions be given during the instructions conference, and his sole stated justification for a second degree murder instruction was that the jury possibly could find that the murder occurred "for reasons other than robbery, for any reason that came out of a brutal attack." (RT 247.) However, as the trial court concluded, "the clear state of the evidence in this case" established a murder during the commission of a robbery, and there was no conclusion which the jury could draw other than that this was a murder which

occurred during the commission of a robbery. (Id.) Based on the entirety of the record, the Court agrees and finds that defense counsel's proffered justification for a second degree murder instruction was unsupported and contrary to the evidence. Accordingly, the trial court's failure to instruct on such lesser included offenses does not state a cognizable claim based on the "theory of the case" exception to the Bashor rule. See Solis, 219 F.3d at 929 (agreeing with state appellate court's conclusion that there was "no error in the trial court's refusal to instruct on voluntary and involuntary manslaughter because there was not substantial evidence to support either charge").

In light of Ninth Circuit precedent and the absence of clearly established United States Supreme Court precedent on the present issue, this Court concludes that Petitioner has failed to raise a cognizable claim based on the trial court's failure to instruct on lesser included offenses. Accordingly, he is not entitled to federal habeas relief on this subclaim of Ground Three. 28 U.S.C. § 2254(d)(1).

V. Petitioner's Conviction Was Supported By Sufficient Evidence.

As the second subclaim of Ground Three, Petitioner asserts that he was convicted based upon insufficient evidence.[20] (Amended Petition at 7.) His theory is as follows:

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[20] In the Return to the First Amended Petition (at 22-25), Respondent argues that Petitioner's claim of insufficient evidence is procedurally defaulted. Where, as here, it is easier to resolve Petitioner's claim on the merits, the interests of judicial economy counsel against deciding more complicated or uncertain procedural issues. See Lambrix v. Singletary, 520 U.S. 518, 524-525, 117 S. Ct. 1517, 1523-24 (1997) (explaining that the interests of judicial economy might counsel denying claim on merits rather than on procedural basis where it was "easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."); Walters v. Maass, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995) (noting that, because the petitioner's claim "fails on the merits, the interests of comity and judicial efficiency are better served by addressing the claim on the merits"). Accordingly, the Court has considered Petitioner's insufficiency of the evidence claim on the merits.

In his habeas petition to the California Supreme Court, Petitioner argued that Ofhgang did not see Petitioner return to pick up Shadden's bicycle that Gray saw Rodriguez, not Petitioner, return and attempt to take the bicycle. Petitioner asserted that he never obtained possession of Shadden's bicycle and that, as a result, at the time when Shadden chased him and Petitioner shot him, Shadden retained possession of his bicycle. He contented that, as he never had possession of the bicycle, he should not have been found guilty of robbery. Petitioner argued that a habeas court, reviewing the evidence, must find that Petitioner's conduct in leaving the bicycle and running away constituted an abandonment of his specific intent to steal the bicycle. (Return, Ex. F at 239-42.) Petitioner further argued that the prosecution failed to establish his "specific intent" to commit first degree murder and failed to acknowledge that he was acting in self-defense when he shot Shadden, as a result of Shadden's pursuit. Petitioner asserted: "It is clear that but for the pursuit of the petitioner by the victim, the victim would TODAY BE ALIVE." (Id. at 243-46; emphasis in original.)

In this action, Petitioner again asserts that his conduct evidenced an abandonment of his specific intent to commit robbery which occurred before he shot Shadden. (Traverse at 17.) He apparently reasons that, as he purportedly was not properly convicted of robbery, he therefore cannot properly have been convicted of felony-murder.

Under the Due Process Clause of the Fourteenth Amendment, a defendant cannot be convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). Therefore, a state prisoner who is convicted of a crime and alleges that the evidence was insufficient to find guilt beyond a reasonable doubt states a constitutional claim for habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321, 99 S. Ct. 2781, 2790 (1979).

When a federal court reviews a sufficiency of the evidence claim in a habeas corpus petition, its job is not to determine

whether it is satisfied that the evidence established guilt beyond a reasonable doubt, however. See Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). Rather, under the standard enunciated in Jackson, it must determine only whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original). When faced with a record of historical facts that supports conflicting inferences, the federal court must presume -- even if it does not affirmatively appear on the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. See id.

The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters, 45 F.3d at 1358; see also Jackson, 443 U.S. at 319, 324-26, 99 S. Ct. at 2789, 2792-93. "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters, 45 F.3d at 1358 (citation and internal quotation marks omitted).

This Court must look to state law to determine what evidence is necessary to convict on the crime charged. See Jackson, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16. Additionally, the Court defers to the state court's interpretation of state law. See Wainwright v. Goode, 464 U.S. 78, 84, 104 S. Ct. 378, 382 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"); see also Missouri v. Hunter, 459 U.S. 359, 368, 103 S. Ct. 673, 679 (1983) (federal courts are bound to accept the state court's construction of that state's statutes).

Under California law, a first-degree felony-murder charge, premised on a killing which occurs substantially contemporaneously with a robbery, is defined as: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted

commission of [robbery] is murder of the first degree when the perpetrator had the specific intent to commit that crime." CALJIC No. 8.21 (6th ed. 1996). (See CT 63.) "The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." Id.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." California Penal Code § 211; see People v. Waidla, 22 Cal. 4th 690, 737, 94 Cal. Rptr. 2d 396, 428 (2000). The property must be taken with the specific intent to permanently deprive the person of the property. People v. Thompson, 27 Cal. 3d 303, 313 n.4, 165 Cal. Rptr. 289, 293 n.4 (1980); In re Albert A., 47 Cal. App. 4th 1004, 1007, 55 Cal. Rptr. 2d 217, 219 (1996). "The robber's escape with the loot is not necessary to commit the crime." People v. Pham, 15 Cal. App. 4th 61, 65, 18 Cal. Rptr. 2d 636, 638 (1993). "There is no requirement that the robber have manual possession of the property." Id.; see also people v. Quinn, 77 Cal. App. 2d 734, 176 P. 2d 404, ___ (1947) (robbery committed when defendant ordered victim, at gunpoint, to throw wallet to ground but then let victim leave with wallet after victim established it did not contain money).

Here, the evidence amply supports Petitioner's conviction. In his confession, heard by the jury, Petitioner admitted that: he went to Belmont Shores to steal bicycles; he and Rodriguez targeted Shadden when they saw him riding by; the van turned around to pursue Shadden; Petitioner and Rodriguez grabbed Shadden's bicycle in order to stop him and steal the bicycle; Shadden was forced off the bike and Rodriguez said "get the bike" and moved forward to take it; Shadden sprayed him with Mace; Shadden chased Rodriguez; Petitioner stayed and Shadden returned because Petitioner was trying to take his bicycle; and, when Shadden ran after Petitioner, he shot him twice. (Confession Transcript at 370-72, 376-79.) Rodriguez returned to take the bicycle but dropped it once he realized he was being observed. (RT 80-81, 103, 126-27.)

In short, Petitioner confessed to shooting Shadden in the course of an aborted attempt to steal his bicycle. "It is established in [California] that after proof of the corpus delicti the confession of a defendant is sufficient to warrant a conviction." People v. Vuyacich, 57 Cal. App. 233, 236, 206 P. 1031, 1032 (1992); People v. Meyers, 7 Cal. App. 2d 351, 354-55, 46 P. 2d 282, 283-84 (1935) ("It is well settled that the identity of the perpetrator of a crime is no part of the corpus delicti . . . and that proof of the corpus delicti plus proof of the confession of the defendant is sufficient to sustain a conviction.") (citations omitted).[21] "When the corpus delecti has been established a defendant may be convicted on the strength of his own confession." People v. Childers, 154 Cal. App. 2d at 22-23, 315 P.2d at 483-84 (finding evidence was sufficient to support robbery conviction based upon the strength of the defendant's confession, although none of the victims positively identified appellant as being the robber).

However,

> A confession is not conclusive against an accused. Its weight and credibility as evidence are to be determined by a jury upon the same principles that they determine the weight and credibility of any evidence; that is, upon the consideration of all the circumstances connected therewith.

Vuyacich, 57 Cal. App. at 236, 206 P. at 1032.

Here, it is apparent that Petitioner's confession was found to be credible by the jury.[22] That confession was sufficient evidence supporting the jury's finding that the murder of Shadden occurred during the commission of a robbery.

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[21] "All that is required to be shown by the prosecution to establish the corpus delicti is that a crime has been committed by someone." People v. Childers, 154 Cal. App. 2d 17, 22, 315 P.2d 480, 483 (1957).

[22] The jury deliberated for less than four hours before rendering its verdict. (CT 41 and 101.) The duration of the deliberations strongly suggest that the jury found Petitioner's confession to be credible and relied heavily upon it in rendering its verdict.

Moreover, Petitioner's confession to the crime was corroborated by Ofhgang's testimony regarding the circumstances surrounding the robbery and Bonilla's recollection of Petitioner's incriminating conversations and conduct immediately following the crime.

Petitioner argues that he "never had possession" of the bicycle and that, therefore, he cannot have been found to have committed robbery. Petitioner's argument overlooks, and is wholly negated by, a wealth of California law regarding what conduct is sufficient to constitute a taking for purposes of robbery. See, e.g., People v. Alvarado, 76 Cal. App. 4th 156, 90 Cal. Rptr. 2d 129 (1999) (sufficient evidence found where defendant, a passenger, ordered victim to stop car while making movements implying he had a gun in his waistband and victim then stopped car and ran away while retaining possession of car keys); People v. Torres, 43 Cal. App. 4th 1073, 1078-79, 51 Cal. Rptr. 2d 77, 79-80 (1996) (there was sufficient evidence to sustain a robbery conviction on following facts: victim discovered defendant in her car, attempting to take her stereo; when victim's friend approached, defendant swung a screwdriver at him; defendant got out of the car, holding the stereo and screwdriver, victim's friend told defendant to leave and victim told him to put the stereo back; defendant left the stereo in victim's car and departed); Pham, 15 Cal. App. 4th 64-67, 18 Cal. Rptr. 2d at 638-39 (robbery found where defendant exited victim's car with bag, victim gave chase and grabbed defendant's shirt, defendant dropped bag and slugged victim: possession and asportation found to have commenced when defendant exited car and to have continued throughout time defendant struggled with victim, even though he had dropped the bag); Quinn, *supra* (victim complied with robber's demand to throw down his wallet). Here, Petitioner, with Rodriguez, admittedly grabbed Shadden's bike, and Shadden was forced off. Shadden chased Rodriguez and then turned around and chased Petitioner who remained near the bicycle. Petitioner's contention that he never had possession of the bicycle is factually erroneous and legally ineffective under California law.

Petitioner's argument that the Court should find that he "abandoned" his intent to steal the bicycle once he ran away from Shadden asks this Court to step into the place of the jury and ignore both his confession and prevailing California law. This Court, of course, cannot usurp the province of the jury. Even if the Court could do so, there is no evidence which supports Petitioner's after-the-fact , self-selving and unsworn assertion that he "abandoned" his intent to steal just before he shot Shadden. His confession supports the opposite conclusion, and Petitioner did not testify at trial. In any event, his contention, even if it were to be believed, is of no legal moment for, as noted above, a criminal need to "escape with the loot" in order to commit the crime of robbery in California: the robbery remained in progress during his struggle with Shadden even though Petitioner was not holding the bicycle in his hands. See Pham, *supra*. See also CALJIC 8.21.1.

The jury had before it sufficient evidence on which to convict Petitioner of robbery. The jury also had sufficient evidence on which it could conclude that Shadden's murder was committed during the course of a robbery or attempted robbery. Hence, the jury properly convicted Petitioner of first degree felony-murder.

Petitioner's secondary argument -- *to wit*, that there was insufficient evidence for the jury to find that he had the specific intent to commit first degree murder because he was acting in self-defense -- is meritless. The jury did not need to find any such "specific intent" in order to convict Petitioner of felony-murder and his purported self-defense is irrelevant. See People v. Tabios, 67 Cal. App.4th 1, 7-8, 78 Cal. Rptr. 2d 753, 756-57 (1998); see also People v. Smithson, 79 Cal. App. 4th 480, 501, 94 Cal. Rptr. 2d 170, 184 (2000) (rejecting a claim that, because a killing during a robbery was "accidental," the felony-murder rule was inapplicable: "How the killing occurred and whether it was intentional are irrelevant"). The jury only need to find that Petitioner had the specific intent to commit robbery, of which Petitioner's confession provided ample evidence.

Petitioner has not established that the evidence was insufficient to support his conviction. A rational jury, on this record, could have found Petitioner guilty of robbery and felony-murder. Accordingly, he is not entitled to federal habeas relief on this subclaim of Ground Three.

VI. Petitioner's Sentence Does Not Violate The Prohibition Against Cruel And Unusual Punishment.

By Ground Four, Petitioner contends that, in light of his youth and lack of prior convictions, his "limited intellectual capacity," and the circumstances of his crime (which he characterizes as an "amateurish and ineffectual attempt to steal a $20 bicycle), his sentence of life without the possibility of parole is cruel and unusual punishment in violation of the Eighth Amendment. (Amended Petition at 7.)

The Eighth Amendment's prohibition against cruel and unusual punishment does not require strict proportionality between a sentence and the crime on which it is based. See Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring) (upholding life sentence without possibility of parole for simple possession of 672 grams of cocaine by defendant with no prior felony convictions); Rummel v. Estelle, 445 U.S. 263, 271, 100 S. Ct. 1133, 1138 (1980) (upholding life sentence on third felony conviction for obtaining $120 under false pretenses). Rather, in non-capital cases, "[t]he Eighth Amendment 'forbids only extreme sentences that are grossly disproportionate to the crime' . . . ." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992) (quoting Harmelin, 501 U.S. at1001, 111 S. Ct. at 2705); see also United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998) (recognizing that Justice Kennedy's view that the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime is the rule of Harmelin). Thus, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare." Rummel, 445 U.S. at 272, 100 S. Ct. at

1138; see also Harmelin, 501 U.S. at 994-95, 111 S. Ct. at 2701-02.

In reviewing the appropriateness of a particular sentence, courts must "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments." Solem v. Helm, 463 U.S. 277, 289, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983). A punishment within the legislatively mandated guidelines is presumptively valid. United States v. Mejia-Mesa, 153 F.3d 925, 930 (9th Cir. 1998). "Generally, so long as the sentence imposed does not exceed the statutory maximum, it will not be overturned on Eighth Amendment grounds." United States v. McDougherty, 920 F.2d 569, 576 (9th Cir. 1990). See also Belgarde v. Montana, 123 F.3d 1210, 1214 (9th Cir. 1997) (same).

As a threshold matter, Petitioner does not argue that his sentence is at variance with California sentencing guidelines. Indeed, he specifically acknowledged in his sentencing memorandum to the trial judge that the maximum sentence under state law was correctly calculated as 25 years to life with or without the possibility of parole. (See CT at 106-07.) His sentence, therefore, presumptively constitutional.

Petitioner's appeal to his youth is unavailing. While the United States Supreme Court has held that "a sentencer in a capital case must be allowed to consider the mitigating qualities of youth," Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668-69 (1993), the Supreme Court has not held such to be the case outside the capital context. The Ninth Circuit has held that, in the non-capital context, a defendant's age has no bearing in assessing the constitutionality of the sentence imposed under a disproportionality analysis. In Harris v. Wright, 93 F.3d 581 (9th Cir. 1996), a fifteen-year-old defendant was sentenced by a Washington state court to life in prison without the possibility of parole, after having aided and abetted a robbery in which his accomplice shot and stabbed the store owner to death. Id. at 582. The Ninth Circuit court rejected the defendant's suggestion that his sentence was disproportionate in light of his youth, declining to "substitute

[the court's own] inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of the Nation's legislatures." Id. at 584 (quoting Thompson v. Oklahoma, 487 U.S. 815, 853-54, 108 S. Ct. 2687, 2708-09 (1988) (O'Connor, J., concurring)).[23]

The Ninth Circuit, in Harris, rejected the habeas petitioner's contention that an inference of gross disproportionality must be drawn when the "'penultimate' punishment" of life imprisonment without parole is imposed on one who committed his crime at 15. Outside of the capital punishment context, "there's no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories." 93 F.3d at 584.

> As the Supreme Court noted in *Harmelin*, 501 U.S. at 996, 111 S. Ct. at 2702, if we put mandatory life imprisonment without parole into a unique constitutional category, we'll be hard pressed to distinguish mandatory life with parole; the latter is nearly indistinguishable from a very long, mandatory term of years, and that, in turn, is hard to distinguish from shorter terms. Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. *See id.* at 995-96, 111 S. Ct. at 2701-02. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.

93 F.3d at 584-85.

For the same reasons here, Petitioner's sentence cannot be found to be disproportionate in light of his crime -- murder. Petitioner's assertion that his sentence is disproportionate because of "the circumstances of the instant case (amateurish

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[23] The Ninth Circuit, in Harris, held that Justice O'Connor's concurrence in Thompson v. Oklahoma represents the Supreme Court's holding in that plurality opinion. 93 F.3d at 584.

and ineffectual attempt to steal a $20 bicycle)" (Amended Petition at 7) is unavailing. Petitioner murdered Shadden in the course of an attempt to steal a bicycle, a crime to which he has admitted. The fact that the attempt was "amateurish" and unsuccessful, and that the bicycle did not have a high monetary value, does not change the fact that Petitioner killed another human being as a result. Any notion that the proportionality analysis should turn on the professionalism or degree of success of the underlying crime, or the value of the property involved, not only is repugnant when a senseless murder is involved but also is wholly contrary to existing Supreme Court precedent, as discussed above.

Finally, Petitioner's contention that his punishment is disproportionate in light of his "limited intellectual capacity" also must be flatly rejected. Petitioner's contention misstates the record. The only evidence of Petitioner's intellectual capacity was the testimony of Mills, presented as a part of the defense case. The psychologist testified that Petitioner's intellectual capacity is at the low end of average. (RT 230-31.) There is no evidence in the record that Petitioner possesses a limited or impaired intellectual functioning and, hence, there is no basis for his present argument.

The United States Supreme Court and the Ninth Circuit have upheld both capital sentences and sentences of life imprisonment without the possibility of release for those under 18 years of age. See Stanford v. Kentucky, 492 U.S. 361, 377-80, 109 S. Ct. 2969, 2979-80 (1989) (upholding sentence of capital punishment as applied to 16 or 17 year-olds convicted of murder); Harris, 93 F.3d at 583-84 (mandatory life imprisonment without possibility of parole for a 15 year-old defendant convicted of murder). Petitioner's sentence comported with that designated by the California Legislature as befitting his crime. California Penal Code § 190.5(b) (sentence of life imprisonment without parole for first degree murder committed with special circumstances for those 16-17 years old at time of crime). Had Petitioner been 18 or older when he murdered Shadden, he could have received the death penalty.

California Penal Code § 190.2. Petitioner's sentence unquestionably is a harsh one. However, it is not for this Court to substitute its subjective judgment regarding Petitioner's appropriate punishment for the determination made by the State of California.

Existing United States Supreme Court precedent does not support any finding that Petitioner's sentence is so disproportionate as to constitute a violation of the Eighth Amendment. The California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Federal law. Accordingly, Petitioner is not entitled to federal habeas relief under Ground Four. 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing this action with prejudice.

Dated: June 4, 2001.

/s/
MARGARET A. NAGLE
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.